

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

GREGORY C. MILTON, )  
Plaintiff, )  
 )  
v. ) C.A. No. 04-10482-MEL  
 )  
WINDELL JONSIEY, et al. )  
Defendants. )

MEMORANDUM AND ORDER

Now before the Court are plaintiff's (1) motion for appointment of counsel and (2) three identical motions for writ of mandamus. For the reasons set forth below, plaintiff's motions are denied.

## BACKGROUND

On March 9, 2004, Gregory C. Milton, a psychiatric patient at the Lemuel Shattuck Hospital Metro-Boston Inpatient Services Unit, filed his self-prepared complaint against the Boston Police Department and several Boston police officers for the alleged violation of plaintiff's constitutional rights. See Complaint ("Compl."), Docket No. 2.

By Order dated May 24, 2004, the Court allowed plaintiff's Application to Proceed Without Prepayment of Fees and directed the clerk to return the complaint for screening on the merits pursuant to 28 U.S.C. § 1915(e)(2). See Docket No. 8.

Now before the Court are plaintiff's (1) motion for appointment of counsel and (2) three identical motions for

writ of mandamus. In his motions for writ of mandamus, plaintiff seeks to have this Court require the defendants to "turn over there (sic) police files to this Honorable (sic) court and the address of Robert (Gus) Williams."

### DISCUSSION

#### I. Motion for Appointment of Counsel

Under Section 1915(e)(1) of title 28, the Court "may request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1). However, a civil plaintiff lacks a constitutional right to free counsel. DesRosiers v. Moran, 949 F.2d 15, 23 (1<sup>st</sup> Cir. 1991) (citations omitted).

In order to qualify for appointment of counsel, a party must be indigent and exceptional circumstances must exist such that the denial of counsel will result in fundamental unfairness impinging on the party's due process rights. Id. To determine whether there are exceptional circumstances sufficient to warrant the appointment of counsel, a court must examine the total situation, focusing on the merits of the case, the complexity of the legal issues, and the litigant's ability to represent himself. Id. at 24 (citations omitted).

This case does not present exceptional circumstances warranting the appointment of counsel at this time. Plaintiff's complaint is subject to screening pursuant to 28

U.S.C. § 1915(e)(2). Thus, plaintiff's request for appointment of counsel will be denied without prejudice.

## II. Motions for Writ of Mandamus

To the extent plaintiff seeks a writ of mandamus ordering the Boston police defendants to provide copies of documents, this court lacks jurisdiction over such claim.

Section 1361 of title 28 provides that:

[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. § 1361.

Here, the defendants are not federal officers, employees or agencies and, as such, are not subject to the statutory mandamus authority of this Court. Therefore, this Court lacks jurisdiction to entertain plaintiff's request for mandamus relief.

The Court notes that plaintiff's motions for writ of mandamus are brought pursuant to Rule 65(a) of the Federal Rules of Civil Procedure. See Motions, p. 3. To obtain the extraordinary remedy of preliminary injunctive relief, plaintiff must show that: (1) he will suffer irreparable harm absent the injunction; (2) the injury outweighs the harm to the defendants if granted; (3) he is likely to succeed on the

merits of the case, and (4) the injunction does not adversely affect the public interest. Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006, 1009 (1<sup>st</sup> Cir. 1981); see Weaver v. Henderson, 984, F. 2d 11, 12 (1<sup>st</sup> Cir. 1993); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop, 839 F. Supp. 68, 70 (D. Mass. 1993) (extending four part preliminary injunction test to temporary restraining orders).

To the extent plaintiff's motions are construed as a request for a preliminary injunction, preliminary injunctions may not be issued without notice to the adverse party, and the motions do not appear to have been served on the defendants. See Fed. R. Civ. P. 65(a)(1).

More importantly, however, the Court notes that plaintiff's motions appear to be a premature attempt at discovery. Because plaintiff's complaint is subject to screening, the motions for writ of mandamus are denied without prejudice to filing such a motion after the complaint is screened pursuant to 28 U.S.C. § 1915(e)(2).

#### ORDER

Accordingly, it is hereby

ORDERED, plaintiff's Motion for Appointment of Counsel (Docket No. 9) is denied without prejudice to filing such a motion after the complaint is screened pursuant to 28 U.S.C. §

1915(e)(2); and it is further

ORDERED, plaintiff's Motions FOR Writ of Mandamus (Docket Nos. 10, 11, 12) are denied; and it is further

ORDERED, the Clerk shall return the complaint to the undersigned for screening on the merits pursuant to 28 U.S.C. § 1915(e)(2).

SO ORDERED.

Dated at Boston, Massachusetts, this 12th day of July, 2004.

/s/ Morris E. Lasker  
MORRIS E. LASKER  
UNITED STATES DISTRICT JUDGE